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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 579

MILTON M. FERRELL,

Petitioner,

vs.

HONORABLE CHARLES B. FULTON, as one of the judges of the United States District Court for the Southern District of Florida,

Respondent.

REPLY BRIEF OF PETITIONER

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The respondent sets forth in his brief (page 2) that the juror in question "was to have a preliminary hearing." This is not factually correct. The court did state (R-13):*

> "See, the juror, after he was in the box and after the case started, is arrested for an alleged shoplifting, apparently, and his case is set down for hearing, **I think he said to us.** That is, the preliminary hearing."

Thus, the court itself was uncertain as to whether

*"R" refers to petitioner's appendix in the court of appeals.

or not the juror had stated that he was to have any preliminary hearing.

The respondent states, on page 4 of his brief, "Doubt of a juror's mental capacity to continue should be as allowable a ground for substitution as the appearance of prejudice." There was never any question of the juror's mental capacity to continue. In fact, the trial court allowed the juror to continue to sit throughout the trial from its commencement through the charge to the jury. The court announced to the jury that juror #12 "had a matter that was worrying him and harassing him", but this was never established by any testimony or statement by the juror himself other than the answer "yes, sir" when the trial judge asked him, "Is your trouble still bothering you a little bit?" (R-15) The two words "yes, sir" was the only utterance made by the juror in open court, all else was mere conjecture by the court, based on what, we do not know. Even if it be assumed that a juror might be worried about some personal matter, such fact falls far short of establishing that the juror is "incapable by reason of mental . . . infirmities to render efficient jury service." Further, it should be noted that the trial court had its doubts as to whether the arrest had even adversely affected the juror. The court stated (R 13-14):

> "Under the circumstances, I don't think he is qualified to sit on a criminal jury because he naturally is going to be affected by it one way or the other. I don't know. Maybe he is a strong man, and this makes him all the stronger."

Thus, the trial court itself had no knowledge and had made no determination as to whether the juror was

adversely affected by the arrest and, certainly, there was never any determination made that the juror was mentally incapable to serve. In fact, the prosecutor made no such contention at the time of trial, but only mentioned the **possibility** that the juror could have been badly treated by the police (R-9). Such supposition was totally without support.

> The respondent states on page 4 of its brief:
> "If a mistrial may be declared, the less drastic action of substituting an alternate juror should be equally permissible."

Petitioner contends that the substitution of a juror with an alternate is no less drastic than declaring a mistrial. A defendant has the valued right to have his trial completed by the particular tribunal summoned to sit in judgment on him. Any interference by the court with that right, whether by declaring a mistrial or by substituting an alternate, must be only in situations of "very extraordinary and striking circumstances." See **Downum v. United States,** 372 U.S. 734

Rule 24 (C) of the Federal Rules of Criminal Procedure recognizes this requirement of the law by providing for the replacement of jurors by alternates only in the event a juror becomes unable or disqualified to perform his duties. The validity of discharging a juror without the consent of a defendant must be determined by the same rules as applied to determining the validity of declaring a mistrial. Nothing was shown in the instant case to establish any inability or disqualification on the part of juror #12 other than the mere fact that he had been arrested for violating a municipal ordinance. This does

not disqualify or render a juror unable to serve. In fact, the violation of a municipal ordinance is not even a misdemeanor under Florida law. See **Roe v. State,** 119 So. 118; **Wendrick v. Strazzula,** Fla. 135 So.2d 1

The respondent cites **Houlihan v. U. S.,** 332 F.2d 8, 12, as being analogous to the instant case. However, in **Houlihan,** the Second Circuit stated:

> "Defendants do not argue that the decision to dismiss the juror was itself erroneous."

The contention in **Houlihan** was solely that the action of the court in excusing the juror should have been taken in open court. Petitioner in the instant case vigorously contends, as he did in the trial court, that the decision of the trial court to discharge juror #12 was definitely erroneous. **Houlihan** is not analogous.

The respondent states (page 5)

> "Certainly the power to substitute an alternate during trial is no different from the power to excuse a member of the venire for cause. Cf. People v. Hamilton, 60 Cal. 2d 105, 126, 383 P. 2d 412, 424."

This is not a correct statement of the law, and the case cited does not so hold. There is considerable discretion vested in the trial judge to excuse a member of the venire for cause, and neither side can complain. But once the tribunal of twelve has been accepted by the defendant to be the determinors of his fate, and such tribunal has been sworn, the defendant then has the valued right

to have his fate decided by that particular tribunal. Nothing short of very extraordinary and striking circumstances can be the basis for discharging or alternating that tribunal.

In support of the statement that the power to substitute an alternate during trial is no different from the power to excuse a member of the venire for cause, the respondent cites **People v. Hamilton,** 60 Cal. 2d 105, 126, 383 P. 2d 412, 424. Such decision does not support respondent's contention. In that case the trial judge, during the penalty phase of a murder trial, substituted an alternate for a juror who had read the Penal Code but who assured the court she would accept the law as given by the court. The California Supreme Court ruled that the dismissal of such juror was reversible error. The California Supreme Court pointed out that Section 1089 of the Penal Code set forth four distinct grounds for discharging a juror and substituting an alternate, none of which were shown to exist in the case. With respect to the code provisions the court stated, on page 424:

> " . . . the entire history indicates a definite unwillingness on the part of the Legislature to either adopt a practice of unrestricted substitution of jurors or to authorize a wide discretion in the trial court beyond that required to apply the facts shown to any one of the four causes for substitution which are set forth in the statute.
>
> . . .
>
> " . . . There was no basis at all for the trial

court's determination that Mrs. McCullough was guilty of misconduct, or was unable to perform her duties. Thus the dismissal of this juror was error and in violation of the restrictions imposed by section 1089 of the Penal Code. All of the cases cited above clearly indicate that this is so. . . . "

Likewise, in the instant case, Rule 24(c) (which is even more restrictive than the California code provision) limits substitution to cases where a juror becomes disqualified or unable to perform his duties. The trial court did not determine that juror #12 was either disqualified or unable to perform his duties. Nor was there any basis upon which a finding of disqualification or inability to serve could have been predicated. The petitioner was placed in jeopardy; the tribunal selected to try him was discharged by the discharge of juror #12; the petitioner may not be required to run the gauntlet of another trial. If a juror may be substituted under the circumstances here presented, it would be possible for a judge to "load" the jury (see **People v. Hamilton,** supra) in favor of one side or the other based solely on the conclusions of the judge derived from private conversations with jurors. If there were four alternates the judge could replace 1/3 of the jury based solely on his private determinations.

The views expressed by the Department of Justice in its brief on behalf of respondent are so drastically opposed to those of petitioner as to illustrate the need for a definitive statement by this court, for the guidance of the district courts, as to when a juror may be properly replaced by an alternate.

Finally, it is to be noted that the respondent does not question the contentions of the petitioner that prohibition or mandamus is the appropriate remedy.

The petition for certiorari should be granted for the reasons set forth in the petition.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner was mailed to the Solicitor General, Department of Justice, Washington, D. C. this _____ day of October, 1967, by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General, Department of Justice, Washington, D. C.

I FURTHER CERTIFY that a copy of the foregoing Reply Brief of Petitioner was personally delivered to WILLIAM A. MEADOWS, JR., United States Attorney for the Southern District of Florida, Federal Building, Miami, Florida, this _____ day of October, 1967.

HERBERT A. WARREN, JR.
Of Counsel for Petitioner